

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPRING CITY CORPORATION,	:	CIVIL ACTION
et al.	:	
	:	
v.	:	
	:	
	:	
LYNN BRADEEN, et al.	:	NO. 97-8127

SPRING CITY CORPORATION,	:	CIVIL ACTION
et al.	:	
	:	
v.	:	
	:	
	:	
AMERICAN BUILDINGS COMPANY	:	NO. 98-28

SPRING CITY CORPORATION,	:	CIVIL ACTION
et al.	:	
	:	
v.	:	
	:	
	:	
AMERICAN BUILDINGS COMPANY	:	NO. 98-105

M E M O R A N D U M

Padova, J.

March 12, 1998

Before the Court is Plaintiff's Motion to Remand Case No. 98-28, to Stay Case No. 97-8127, and to Vacate the Court's Order Dismissing Count 5 of the First Amended Complaint in Case No. 98-28. Because Defendants have not demonstrated the existence of diversity jurisdiction under 28 U.S.C.A. § 1332 (West 1993 & Supp. 1997), the Court will grant Plaintiff's Motion to Remand Case No. 98-28. In addition, the Court will vacate its Order

dismissing count 5 of the First Amended Complaint in Case No. 98-28 and will stay Case Nos. 97-8127 and 98-105.

I. BACKGROUND

Plaintiff has filed three lawsuits that all concern the collapse of a roof of a metal building on January 12, 1996. Two of the lawsuits -- Case Nos. 97-8127 and 98-28 -- were filed in state court and removed to federal court. One lawsuit -- Case No. 98-105 -- was filed by Plaintiff in federal court. Before the merits of Plaintiff's Motion can be addressed, the Court must sort out the procedural history and status of the three lawsuits.

On September 10, 1997, Plaintiff filed its first complaint in the Court of Common Pleas of Berks County against Contractors of America ("Contractors") and its president, Lynn Bradeen ("Bradeen"). On November 13, 1997, Defendants Bradeen and Contractors joined Basile Construction Corporation ("Basile"), Palmer Construction Co., Inc. ("Palmer"), and American Buildings Company ("American Buildings") as additional defendants with the filing of writs of summons, pursuant to Rule 1007 of the Pennsylvania Rules of Civil Procedure. 42 Pa.C.S.A. Rule 1007 (Purdon 1987). On December 3, 1997, Plaintiff filed a first amended complaint, adding American Buildings. On January 5, 1998, American Buildings removed this action to this Court on the basis of diversity jurisdiction, pursuant to 28 U.S.C.A. § 1441

(West 1994), and it was assigned Case No. 98-28.¹ On January 7, 1998, American Buildings moved to dismiss count 5 of the Amended Complaint, the only count in which American Buildings was named as a defendant. The Court granted this Motion by Order entered on January 27, 1998.

On December 10, 1997, Plaintiff filed a second complaint in the Court of Common Pleas of Berks County against America Buildings only. On December 31, 1997, America Buildings removed the second state court action to this Court on the basis of diversity jurisdiction, and the case was assigned Case No. 97-8127. On January 12, 1998, American Buildings filed a third-party action against Contractors. On February 13, 1998, Contractors filed a fourth-party action against Palmer and Basile.

On January 9, 1998, Plaintiff filed a complaint in this Court against American Buildings, which was assigned Case No. 98-105. American Buildings filed a third-party complaint against Contractors.

II. LEGAL STANDARD

28 U.S.C.A. § 1441 (West 1994), the removal statute, provides, in relevant part, as follows:

¹Defendants Bradeen and Contractors later joined the removal petition (Doc. No. 8).

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Case No. 98-28 was removed on the basis of diversity

jurisdiction, pursuant to 28 U.S.C. § 1332, which provides as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between--

(1) citizens of different States ...

Lack of federal subject matter jurisdiction is a proper ground for remand. Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207, 1215 (3d Cir. 1991). If subject matter jurisdiction is lacking, remand is mandatory. 28 U.S.C.A. § 1447(c)(West Supp. 1993). When a case is removed from a state court, the removing party bears the burden of proving the existence of federal subject matter jurisdiction. Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990). The removal statutes "are to be strictly construed against removal and all doubts should be resolved in favor of remand." Steel Valley Auth. v. Union Switch

and Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987)(citing Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985)).

III. DISCUSSION

A. Motion to Remand

Complete diversity of citizenship must exist at the time of removal.² United Food Local 919 v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994); American Dredging Co. v. Atlantic Sea Con. Ltd., 637 F. Supp. 179, 181 (D.N.J. 1986). The citizenship of the parties is as follows: Plaintiff, Palmer, and Basile are citizens of Pennsylvania; American Buildings is a citizen of Alabama; and Bradeen and Contractors are citizens of New Jersey. The question presented by Plaintiff's Motion to Remand Case No. 98-28 is whether the Court should consider the citizenship of Palmer and Basile in deciding whether complete diversity existed at the time of removal.

Rule 1007 of the Pennsylvania Rules of Civil Procedure provides that an action in the Pennsylvania courts "may be commenced by filing with the prothonotary (1) a praecipe for a writ of summons, (2) a complaint, or (3) an agreement for an amicable action." Defendants Bradeen and Contractors filed writs

²Although complete diversity must also exist at the time the original action was filed in state court, Plaintiff only argues that complete diversity was lacking at the time Defendants sought removal.

of summons joining Palmer and Basile as defendants prior to the removal of Case No. 98-28 to federal court. At the moment these writs were filed in the state court action, Palmer and Basile were additional defendants and Plaintiff had a direct right of recovery against Palmer and Basile. 42 Pa.C.S.A. Rule 2255(a) and (d)(Purdon 1987). Under these circumstances, the Court finds that Palmer and Basile were "defendants" within the meaning of the removal statute and their citizenship had to be considered in determining whether diversity jurisdiction existed at the time of removal. Because Plaintiff, Palmer, and Basile are citizens of Pennsylvania, subject matter jurisdiction based on diversity of citizenship did not exist at the time of removal. Case No. 98-28 was improperly removed to this Court and remand is required under Section 1447(c).

The Court notes that when faced with this identical question, Judge McGlynn held that (1) a non-diverse defendant joined by a writ of summons in a Pennsylvania state court action destroyed complete diversity, (2) that the action had been improperly removed on the basis of diversity jurisdiction, and (3) that the action must be remanded to state court. Adams v. Ford Motor Company and Donna Lynn Peyton, Civ.A.No. 87-0524, 1987 WL 13344 (E.D.Pa. June 30, 1987). The Court finds that the reasoning set forth by Judge McGlynn in Adams is persuasive:

[D]iversity jurisdiction cannot be established because at the time Ford filed its petition, additional defendant

Peyton was a party to this action and both Peyton and plaintiff were citizens of Pennsylvania. Under the Federal Rules of Civil Procedure, Peyton would be a third-party defendant, subject only to the claim of the defendant who joined her in the action. Chase v. North American Systems, Inc., 523 F. Supp. 378, 380 (W.D. Pa. 1981). The citizenship of a third-party defendant, under the federal rules, would not prevent a defendant from removing the plaintiff's action based on diversity jurisdiction. Under the Pennsylvania Rules of Civil Procedure, however, Peyton is treated as an additional defendant and is 'subject to plaintiff's claim in every respect and with the same force and effect as if [she] had been originally named as a defendant, and even without the necessity of any pleading being filed by the plaintiff against [her].' Sheriff v. Eisele, 381 Pa. 33, 35, 112 A.2d 165, 166 (1955). See also Atlanta International Insurance Company v. The School District of Philadelphia, 786 F.2d 136, 140 (3d Cir. 1986); Carey v. American Motors Corporation, C.A. No. 87-0100 (E.D. Pa. Jan. 23, 1987). Consequently, the citizenship of additional defendant Peyton must be considered in determining whether diversity jurisdiction exists. Because both Peyton and plaintiff were citizens of Pennsylvania at the time removal was sought, complete diversity of citizenship is lacking and this court would not have had original jurisdiction over the state court action.

Adams, 1987 WL 13344, at *2; accord Carey v. American Motors Corporation, Civ.A.No. 87-0100, 197 WL 5726 (E.D.Pa. Jan. 23, 1987).

Accordingly, Plaintiff's Motion to Remand Case No. 98-28 to the Court of Common Pleas of Berks County will be granted.

B. Motion to Vacate Court's Order in Case No. 98-28

At the time the Court granted Defendant American Buildings' Motion to Dismiss and dismissed count 5 of Plaintiff's First Amended Complaint in Case No. 98-28, Plaintiff had not yet challenged the diversity jurisdiction of this Court. Because the

Court now finds that subject matter jurisdiction under 28 U.S.C. § 1332 was lacking at the time of removal, it necessarily follows that the Court was without power to grant Defendant American Buildings' Motion to Dismiss. Steel Valley, 809 F.2d at 1010 (lack of subject matter jurisdiction voids any decree entered in a federal court). Therefore, the Court will vacate its 1/27/98 Order on the grounds of lack of subject matter jurisdiction.

C. Motion to Stay Case No. 97-8127

Plaintiff also asks the Court to stay Case No. 97-8127 in deference to Case No. 98-28, which will proceed in state court following this Court's remand order. Plaintiff's request is based on principles of judicial economy and sound judicial administration, recognized by the Supreme Court in Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236 (1976) as valid reasons for a federal court to apply the doctrine of abstention.³ The decision to stay a federal action in favor of a parallel state action is motivated by a desire to prevent the waste of valuable judicial resources.

Before the Court can reach the issue of a stay, the Court must first address whether the state and federal actions are in fact parallel. Actions are parallel if they present

³In seeking this stay, Plaintiff admits that Case No. 97-8127 was properly removed to this Court.

substantially the same facts, issues and parties. Trent v. Dial Medical of Florida, Inc., Civ.A.No. 92-4493, 1992 WL 365625, at * 1 (E.D.Pa. Nov. 30, 1992). Under this test, the Court finds that Case Nos. 97-8127 and 98-28 are parallel actions. Both lawsuits concern the exact same set of facts concerning the collapse of the roof of a metal building on January 12, 1996 and the same set of legal issues. In addition, both lawsuits involve virtually the same parties. Plaintiff, American Buildings, Contractors, Palmer, and Basile are parties to both lawsuits. Although Lynn Bradeen, president of Contractors, is named as an individual defendant only in Case No. 98-28, exact symmetry between the actions is not required.⁴ Instead, parallelism turns on whether the state litigation will dispose of all of the claims raised in the federal case. Benninghoff v. Tolson, Civ.A.No. 94-2903, 1994 WL 519745, at *2 (E.D.Pa. Sept. 22, 1994); Moore, 1993 WL 46684, at *2. Accordingly, because these cases present the exact same facts and issues and virtually the same parties, and because plaintiffs are able to present all legal claims in state court, the cases are parallel.

Because the state and federal lawsuits are overlapping, the Court must next decide whether to stay Case No. 97-8127. This

⁴The remanded action, Case No. 98-28, is more comprehensive than Case No. 87-8127. This fact weighs in favor of applying the Colorado River doctrine. Moore v. John S. Tilley Ladders Co., Inc., Civ.A.No. 92-5902, 1993 WL 46684, at *3 (E.D.Pa. Feb. 23, 1994).

decision falls within the Court's discretionary power. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664, 98 S. Ct. 2552, 2558 (1978). In making this determination, the Court is guided by the following factors: (1) which court first assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties. Colorado River, 424 U.S. at 818, 96 S. Ct. at 1246; Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 23-26, 103 S. Ct. 927, 941-942. (1983). These factors, which constitute what is sometimes called the "exceptional circumstances" test, are not a "mechanical checklist," Cone, 460 U.S. at 16, 103 S. Ct. at 937, nor is "one factor [] necessarily determinative." Colorado River, 424 U.S. at 818, 96 S. Ct. at 1246.

The Court notes that the first, second, and fourth factors cited by the Supreme Court have little or no significance here. Neither forum is more convenient than the other -- the courts are not located very far apart, and neither court has exercised jurisdiction over property. The fact that Case No. 98-28 was filed first is also of little importance because Case No. 97-8127 was filed soon thereafter and both cases have progressed at the

same rate.⁵

The remaining factors weigh heavily in favor of staying Case No. 97-8127. With respect to the third and fifth factors, "the principal reasons to abstain, once abstention has been found to be possible, is to avoid piecemeal litigation and to adjudicate state law issues in state court". Trent, 1992 WL 365625, at *6. Here, all of the claims asserted in both actions are based on Pennsylvania law. There is no federal law involved. The sixth factor also weighs in favor of deference to the state action. The Berks County court is certainly capable of protecting the legal rights and interests of the parties. Under these circumstances, the Court finds that the stay of Case No. 97-8127 is warranted.⁶

An appropriate Order follows.

⁵The Court notes that during a telephone conference with all counsel held on March 10, 1998, the Court was advised that the parties were not differentiating among the cases in terms of discovery. Therefore, it appears that the discovery that has been completed by the parties while all three cases were before this Court can be used in remanded Case No. 98-28.

⁶The Court will also stay Case No. 98-105 for the same reasons set forth herein.